

SALVATRICE SOFIO

v.

INTERNAL REVENUE SERVICE

Docket No.

CH07528110002

OPINION AND ORDER

Appellant, a GS-12 Revenue Agent with the Internal Revenue Service (agency), was suspended for 15 calendar days for: (1) failure to follow supervisor's instructions; (2) making false statements in matters of official interest; and (3) poor utilization of time. Appellant's past disciplinary record was also considered by the agency. Appellant filed a timely petition for appeal with the Board's Chicago Regional Office. In her petition she alleged that the charges were based on a distortion of the facts surrounding her relationship with another branch of the agency. She also alleged that the suspension was a result of discrimination based on marital status, national origin, and sex (single, Italian, female).

The presiding official, after three attempts to hold a hearing, finally adjudicated the case on the record. He sustained the agency's action and dismissed appellant's claim of discrimination.

In her petition for review, appellant has not challenged the factual findings of the presiding official. Rather, she generally alleges that the presiding official's denial of a further postponement was an abuse of his discretion and denied her right to a hearing. This contention is without merit.

Although it is clear that an appellant has a right to a hearing under 5 U.S.C. § 7701(a), a presiding official has the authority to determine the hearing date and to take all action necessary to avoid delay. 5 C.F.R. § 1201.41(b)(5). A request for postponement will be granted only when good cause is shown. 5 C.F.R. § 1201.51. The issue, then, is whether the appellant established good cause for the requested third postponement.

The hearing date in the instant case was originally set for December 2, 1980. The agency was granted its request to depose the appellant before the hearing, but due to the previous commitments of appellant's representative, the deposition was not held until December 10, 1980. The hearing was, therefore, postponed until December 17, 1980.

On December 17, the agency and the presiding official appeared for the scheduled hearing and were ready to proceed, but neither the appellant nor her representative appeared at the Regional Office. After waiting 45 minutes, the presiding official called the representative's secretary to inquire as to the whereabouts of appellant and her representative. It was finally determined that the representative was ill. No reason was ever advanced as to why there was a failure to notify the Regional Office of the representative's illness. The presiding official

nevertheless determined that good cause existed to again postpone the hearing.

Because the discrimination claim mandated adjudication within 120 days,¹ and because there had already been two postponements, the presiding official notified appellant (who had finally arrived at the hearing) that the next date set for the hearing would be subject to no postponements.² Accordingly, the presiding official again contacted the representative's secretary to establish a new date for the hearing. Although it is unclear whether the secretary consulted appellant's representative before choosing December 22 as an appropriate date for the rescheduled hearing, the secretary informed the presiding official that December 22, 1980 was an available date and the presiding official continued the hearing until that date.³

On the afternoon of December 19, however, the appellant's representative called the presiding official to request another postponement, stating that he had a grand jury appointment on the 22nd. The presiding official denied the request. At the hearing on December 22, which appellant's counsel did not attend, the presiding official gave appellant three choices: (1) to proceed by herself; (2) to choose another representative, or (3) to have the matter adjudicated on the record (with, possibly, a week to submit a brief). Appellant refused to consider any of the alternatives, and the presiding official closed the record and decided that the matter would be adjudicated on the record.

The presiding official did not err in denying the third postponement. We note that both previous postponements were due to the inability of appellant's representative to timely represent appellant. While the two previous postponements were for good cause, appellant's representative failed to show good cause as to the requested third postponement or why he was unable to avoid scheduling the hearing on a date when he had prior commitments.

Appellant is responsible for the errors of her counsel since she chose her representative. See *Link v. Wabash Railroad Company*, 370 U.S. 626, 633-4 (1962); *Bennett v. Department of the Navy*, 2 MSPB 93, 99 (1980). Additionally, appellant was on notice as to the importance of meeting the December 22 hearing date. She should, therefore, have made every effort to secure the appearance of her representative. The record discloses no attempt on the part of the appellant to assure that her representative would appear as scheduled on December 22.

¹5 U.S.C. § 7702.

²Since we find that the appellant did not show good cause for the third postponement, we do not decide whether, in other circumstances, appellant's interests would have outweighed the Board's interest to expedite agency actions. Cf. *Alonzo v. Department of the Air Force*, 4 MSPB 262, 264 (1980).

³Since the representative is responsible for communications with his secretary, this point is not dispositive of the issue of good cause for the postponement.

In balancing the conflicting interests of appellant's right to a hearing and the Board's policy of expeditiously resolving cases, the presiding official is granted appropriate authority to accomplish his task. Under 5 C.F.R. § 1201.43(b), a presiding official may dismiss an appeal for failure to prosecute or defend it. This ultimate sanction, however, was not imposed on appellant. Instead, the Board finds, the presiding official acted reasonably and adequately protected appellant's rights while justly sanctioning her for failure to prosecute her appeal in a timely manner. *Cf. Starkey v. Department of the Air Force*, 3 MSPB 377 (1980). The presiding official, therefore, did not abuse his discretion.

Accordingly, the petition is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. Appellants who file a civil action in a U.S. District Court concerning the Board's decision on the issue of discrimination have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs, or security be waived. A civil action or petition for judicial review must be filed in an appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *August 31, 1981*